Supreme Court, U.S.
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No. 02 308

IN THE

Supreme Court of the United States

NICK MARINO,

Petitioner,

—v.—

KENOFF & MACHTINGER, LLP,
JAY KENOFF AND LEONARD MACHTINGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Section 301 of the United States Labor Management Relations Act expressly and completely reserves to the United States District Courts the interpretation of all collective bargaining agreements. 29 U.S.C. § 185 et seq. The United States District Court for the Central District of California has construed the Writers Guild of America collective bargaining agreement and arbitration procedures promulgated thereunder. Affirmed, *Marino* v. *Writers Guild of America, East, Inc.*, 992 F. 2d 1480 (9th Cir. 1993). In this matter, a California state court exercised jurisdiction to determine, *de novo*, the meaning and extent of the Writers Guild of America collective bargaining agreement and arbitration procedures thereunder, rejecting the findings of the Ninth Circuit and violating the exclusive jurisdiction of the federal courts. The question presented is whether the Supreme Court of California erred in affirming the judgment of the state court, acting in excess of its subject matter jurisdiction.

TABLE OF CONTENTS

	Page
Question Presented	(i)
Table of Contents	(ii)
Table of Authorities	(iii)
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Petition	15
Conclusion	19
Appendix A	A-1
Appendix B	A-26
Appendix C	A-27

TABLE OF AUTHORITIES

Cases	Page
Avco Corp. v. *Aero Lodge No. 735*, 390 U.S. 557 (1968)	6
BlueCross and BlueShield of Maryland, Inc. v. *Weiner*, 868 F.2d 1550 (11th Cir. 1989)	15
Caterpillar v. *Williams*, 482 U.S. 386, 391	6
Ferguson v. *WGA*, (1991) 226 Cal.App.3d 1382	16, 18
Grubb v. *Public Utilities Commission of Ohio*, 281 U.S. 470, 476 (1930)	6
Hernandez v. *Conriv Realty Associates*, 116 F.3d 35, 38-39 (2d Cir. 1996)	9
International Longshoremen's Association v. *Davis*, 476 U.S. 380, 408 (1986)	15
Lydon v. *Boston Sand & Gravel*, 175 F.3d 6 (1st Cir. 1999)	6, 9
Marino v. *Kenoff & Machtinger*, B142506, June 14, 1999 (unpublished opinion)	5, 15
Marino v. *Writers Guild of America, East, Inc.*, 510 U.S. 978 (1993), cert. denied, 510 U.S. 1066 (1994)	4
Marino v. *Writers Guild of America, East, Inc.*, 992 F. 2d 1480 (9th Cir. 1993)	i, 16, 19
Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987)	6
Olson Farms, Inc. v. *Barbosa*, 134 F.3d 933 (9th Cir. 1998)	15
Transportation-Communication Employees Union v. *Union Pacific Railroad Co.*, 358 U.S. 157,160, 87 S. Ct. 369, 371 (1966)	10, 13, 14

Statutes	
28 U.S.C. § 1257	1
29 U.S.C. § 185 et seq.	i

29 U.S.C. § 185(a) 3,9

Constitutional Provisions

U.S. Constitution, Art. VI, Sec. 2 16

Nick Marino respectfully petitions for a writ of certiorari to review the order of the Supreme Court of California, denying review of the opinion and order of the California Court of Appeal, Second Appellate District, affirming the judgment of the trial court in this case.

OPINIONS BELOW

The opinion of the court of appeal (App. A., *infra*) is unreported. The order of the court of appeal denying petitioner's petition for rehearing (App. B., *infra*) is unreported. The order of the Supreme Court of California denying petitioner's petition for review (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the trial court was entered on February 27, 1998. The judgment against petitioner (following an order granting summary judgment) was reversed in part, remanded, and affirmed by the court of appeal on December 10, 2001. The petition for rehearing was summarily denied on January 7, 2002. The petition for review was summarily denied on March 13, 2002. Petitioner's time to file this petition was extended by the Clerk of this Court, to and including August 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and under U.S. Constitution, Art. VI, Sec. 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution, Art. VI, Sec. 2, provides that,

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 301(a) of the Labor-Management relations Act provides, "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT

1. This case involves the exclusive jurisdiction of the District Courts of the United States to determine the rights and obligations of the parties to collective bargaining agreements.

2. Petitioner, a professional screenwriter, sought screenwriting credit for his work incorporated in the screenplay for "GODFATHER III," a major motion picture produced and directed by Francis Ford Coppola ("Coppola"). Petitioner is a member of the Writers Guild of America ("WGA"), a certified collective bargaining unit, representing screenwriters in the film industry. Screenwriting credit for "GODFATHER III" was awarded by WGA arbitrators to Coppola and Mario Puzo ("Puzo")[1] following proceedings conducted pursuant to the WGA collective bargaining agreement ("CBA") and procedures thereunder.[2] Screenwriting credit is a primary determinant of future success, economically and otherwise, in the entertainment industry.[3]

3. Petitioner sued the WGA, Coppola, and Puzo in the U.S. District Court for the Central District of California, seeking to vacate the arbitration award, claiming that the WGA violated its federal common law duty of fair representation, breached the terms of the CBA, and used arbitration procedures which were fundamentally unfair and bore no indicia of due process, pursuant to § 301 of the Labor-Management

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1 Author of the best-selling novel, THE GODFATHER (G.P. Putnam's Sons 1969).

2 Petitioner made a number of objections to the procedures in letters to the WGA (the "Objection Letters"). Those objections were sent a full 25 days prior to the commencement of the arbitration panel was chosen. The objections were disregarded.

3 "Both economic benefits and the writer's status in the industry are affected by the receipt of screen credit." *Marino* v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480, 1481 (1993).

Relations Act and federal common law. The District Court, exercising exclusive jurisdiction under § 301 of LMRA and federal common law, entered summary judgment in favor of the WGA, Coppola and Puzo.[4] Final judgment was entered and an appeal was had in the Ninth Circuit. Respondent law firm and individual members Kenoff and Machtinger represented petitioner before the WGA and in the federal court action under the LMRA.

4. In a published opinion in *Marino* v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480 (1993), the federal Court of Appeals interpreted the CBA and screenwriting credit arbitration procedures promulgated thereunder to determine whether the WGA had breached the CBA and breached its duty of fair representation in connection with: (1) arbitration procedures adopted by the WGA; (2) adopted but not used by the WGA; and (3) procedures which should have been adopted to guarantee the fairness of the arbitration process. The Ninth Circuit Court of Appeals held that the WGA's CBA provided arbitration procedures which met minimum fairness standards required by federal law but that petitioner had waived his right to those procedures. Petitioner's petition for

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[4] The gravamen of the instant action is that Respondent failed to bring to the District Court's attention in Petitioner's opposition to the motion for summary judgment, each of the objections made by Petitioner to the WGA as well as the evidence that those objections were, in fact, timely made. The subsequent Ninth Circuit opinion and order affirming the summary judgment misapprehended the true facts. Respondent committed other errors and omissions, such as failing to advise Petitioner to request or actually requesting the Phase I hearing so critical to the Ninth Circuit reasoning.

writ of certiorari in the United States Supreme Court was denied. *Marino* v. *Writers Guild of America, East, Inc.*, 510 U.S. 978 (1993), cert. denied, 510 U.S. 1066 (1994). The instant action for legal malpractice followed.

5. The gravamen of this action is that the "waivers" recited by the Ninth Circuit in *Marino* v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480 (1993) were actually the result of professional negligence. That is, petitioner's own attorneys had failed or refused to request an evidentiary hearing with rights to confrontation and cross-examination or to demonstrate that claims arising under the LMRA and federal common law had, in fact, been made by petitioner in writing to the WGA and then abandoned by his attorneys. The trial court below granted summary judgment to respondents on all causes of action, later reversed by the Second Appellate District in *Marino* v. *Kenoff & Machtinger*, B142506, June 14, 1999 (unpublished opinion).

6. On remand, the trial court again entertained a motion for summary judgment against petitioner, granting the motion in part and denying it in part. As to rights waived by respondent in its legal representation of Petitioner in the District Court in *Marino*, the court found no triable issue of fact as to damage caused Petitioner by such negligence. As to the separate claim that petitioner's attorneys failed to request the due process described by the Ninth Circuit Court of Appeals and held to be available under the CBA, a bifurcated evidentiary mini-trial was conducted. The California trial court undertook to

construe the CBA and regulations promulgated thereunder. After hearing evidence from many witnesses, including experts, the *trial court issued its findings that the CBA procedures described by the Ninth Circuit did not, in fact, exist.* The court entered judgment for respondents. This appeal ensued. The judgment was affirmed by the California Court of Appeal, Second Appellate District, on December 10, 2001 and that same court denied a Petition for Rehearing by order dated January 6, 2001. Petitioner's Petition for Review of the Court of Appeals decision was denied on March 13, 2002.

7. State and federal courts have concurrent jurisdiction of suits of a civil nature "arising under" the laws of the United States except where jurisdiction has been restricted by Congress to the federal courts. *Grubb* v. *Public Utilities Commission of Ohio*, 281 U.S. 470, 476 (1930). In some instances, federal law can so completely preempt state law that the petitioner's complaint must be considered as stating a federal cause of action. *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968). The preemptive force of a statute can, on occasion, be so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim." *Caterpillar* v. *Williams*, 482 U.S. 386, 391 (1987). There are few federal statutes with the power to convert a state law claim into a federal claim. The complete preemption of federal collective bargaining law -- and its interplay with state law claims -- was explained by the First Circuit Court of Appeals in *Lydon* v. *Boston Sand & Gravel*, 175 F.3d 6 (1st Cir. 1999):

"Certain aspects of federal labor law have long been construed to preempt the field -- they not only provide for federal jurisdiction over contract disputes but also prohibit certain state law actions in the same subject area. In the labor law context, the statutory foundation for such complete preemption is found in Section 301(a): [¶] 'Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.' [¶] From those simple words, a complex preemption jurisprudence has grown in stages. Initially state courts were simply prevented from applying local rather than federal law in deciding contract disputes about CBAs, but then the doctrine was extended to preempt state law remedies whenever resolution of a petitioner's claim is substantially dependent on analysis of a CBA's terms. Such preemption is necessary according to the Supreme Court, to retain consistency in the interpretation

of terms common to CBAs and to prevent parties from relabeling as state law claims their action that in actuality arise under a CBA []. [¶] Nonetheless the doctrine does not preclude all state law claims that are somehow linked to a labor dispute. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (emphasis added) states the test for determining whether a particular state remedy has been preempted by federal law: '[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles -- necessarily uniform throughout the Nation -- must be employed to resolve the dispute.

"Mere parallelism between a state law claim and a federal contract claim does not necessarily require state court interpretation of the CBA -- that is, as long as the state claim can be resolved without construing the agreement itself, it is not preempted by Section 301 (*id.* at 409-10). Furthermore, 'the bare fact that a collective-bargaining agreement will be consulted in the course of state-law plainly does not require the claim to be

> extinguished.' (*Livadas*, 512 U.S. at 124, citing and thereafter quoting from *Lingle*, 486 U.S. at 413, n. 12.). [¶] Courts confronted with state law claims must therefore locate the line between the need for mere consultation of a CBA, which does not demand federal preemption, and more active interpretation of that agreement, which does preempt the state law claims. As we have said of that dichotomy, '[o]ur premise is that this means a real interpretive dispute' (*Martin* v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir. 1997)(emphasis in original))."

Lydon, 175 F.3d 6, 10-11 (1st Cir. 1999)(some citations omitted).

8. Unlike instances of concurrent jurisdiction, "in the field occupied by Section 301 (broadly construed), Congress and the Supreme Court have determined that the federal courts should have exclusive jurisdiction. *Not only have they conferred jurisdiction over such claims on the federal courts, but they have also prohibited state courts from hearing them.*" *Lydon*, at p. 14 (emphasis added). See also, *Hernandez* v. *Conriv Realty Associates*, 116 F.3d 35, 38-39 (2d Cir. 1996)("[A]n application of state law is pre-empted by § 301...only if such application requires the *interpretation* of a collective-bargaining agreement") (emphasis added), citing *Livadas*, 512 U.S. at 124 ("[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be

consulted in the course of state-law litigation plainly does not require the claim to be extinguished"). See also, *Sangmeister* v. *Airborne Express*, ___ F. Supp. ____, 2001 U.S. Dist. LEXIS 13466, 18 BNA IER CAS 699 (E.D. Pa. 2001) ("Courts evaluate whether preemption is proper by determining whether the tort claim is 'inextricably intertwined' with the consideration of the CBA's terms").

9. Here, the trial court actively interpreted the CBA and the credit arbitration regulations adopted thereunder in its Phase I mini-trial. (This fact is admitted; see, e.g., Respondents' Brief on appeal: "during the 5-day bench trial, [the trial court] heard testimony from representatives of the WGA and from outside experts regarding their *interpretations of the Credits Manual as well as WGA custom and practice with respect to the nature, scope, purpose and effect of a Phase I Hearing.*" Id., at pp. 29-30 (emphasis added). In doing so, the trial court acted in excess of its jurisdiction under applicable federal law. Respondent argued that this was permissible: "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services and is not governed by the same common law principles." *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 358 U.S. 157, 160, 87 S. Ct. 369, 371 (1966). In order to interpret a collective bargaining agreement, it is necessary to consider the scope of other related collective bargaining agreements as well as the practice, usage and custom pertaining to all such agreements. *Id.*, at 161.

> "The case law firmly establishes that interpretation of collective

> bargaining agreements is solely a judicial function, even when such interpretation involves the consideration of conflicting extrinsic evidence. *Kemmis* v. *McGoldrick*, 767 F.2d 594 (9th Cir. 1985); *Operating Engineers Pension Trusts* v. *B & E Backhoe, Inc.*, 911 F.2d 1347 (9th Cir. 1990)."

Id., at p. 28. It is not disputed, therefore, that the entire purpose of the trial court's action was to receive conflicting extrinsic evidence concerning the meaning of the CBA and to interpret and construe *de novo* the CBA. However, the cases cited as approving of this procedure involved only interpretation of a CBA *by a United States District Court*, exercising its exclusive authority to do so under federal labor law.

10. Having engaged in such interpretive exercise in excess of its jurisdiction, the trial court then reached a conclusion which effectively eviscerated petitioner's rights under the CBA and federal CBA jurisprudential law. The trial court held, and the California appellate courts affirmed, that the purpose of a Phase I hearing under the CBA and regulations is available simply to determine which literary materials should be submitted to the arbiters for the Phase II hearing. Further, the trial court found that script comparisons occur at Phase II, not at Phase I. The court also rejected petitioner's interpretation of the term, "authorship" as used in the Credits Manual, finding it was unsupported by industry custom and practice. The California courts plainly applied state law principles of

contract interpretation[5] rather than federal law principles, as established in the Ninth Circuit Court of Appeals controlling opinion in *Marino*. That court wrote, in contrast:

> "A portion of the collective bargaining agreement titled "Theatrical Schedule A, Theatrical Credits," sets forth the general rules of credit determination. The procedures for arbitration of credit disputes are set out in WGA's 'Credits Manual.' They are not part of the collective bargaining agreement, but are approved by WGA's board of directors and by vote of its membership. According to the Credits Manual, the arbitration has three phases.
>
> "What we will call the first phase is a procedure through which common factual disputes can be resolved. If there are disputes as to 'authenticity, identification, sequence, authorship or completeness of any literary material to be considered' a special committee conducts a 'hearing at which all participating writers may present testimony and documentary evidence.' Manual, Credit Determination Procedure

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5 This was conceded by respondents in their Respondents' Brief on appeal when they wrote at great length concerning California's parol evidence rule and when extrinsic evidence may be admitted to interpret a contract. Respondents' Brief at pp. 31-34 (referring to "ordinary contract interpretation principles").

(CDP) § D.4. That committee's factual determination is binding and forms a part of the basis of the material that goes to those who conduct the second phase of the process."[6]

11. Contrary to respondents' assertions, the trial court's ruling, and the California Supreme Court's affirmance thereof, the Ninth Circuit did not hold that the anonymity objection was without merit or, conversely, that having an anonymous arbitration panel is "fundamentally fair." All the Ninth Circuit determined was that the objection was waived by petitioner, since he submitted to the arbitration and voluntarily participated in it, without making such an objection. *Marino*, 992 F.2d 1480, 1484-1485). In fact, the Ninth Circuit specifically noted that if the objection had been timely made, the WGA might have dealt with it by informing the arbitrators of the objection, allowing some to resign, perhaps finding others who "had no objection to disclosure of their names...We do not know." Id., at p. 1485. The Ninth Circuit dispatched petitioner's other unfairness and breach objections on the same basis. *The case does not stand for the proposition that the procedures are fundamentally fair; it stands for the proposition that attacks on fundamentally unfair procedures must be asserted timely.* Cases citing *Marino* stand for the

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[6] Phase II is the review of the materials submitted to the anonymous three-arbiter panel for confidential evaluation. No hearing is conducted. The writers may submit a position statement. *Id.* There is no confrontation and cross-examination of witnesses. Phase III is a review procedure by the WGA Policy Review Board. *Id.*

proposition that one may not sit by during arbitration and fail to assert objections to the fairness of the process and then collaterally attack the award.

For example, the Ninth Circuit was fairly hospitable to petitioner's federal unfair representation claims. The Court of Appeals was plainly disturbed by the "stricture" that writers' statements submitted to the anonymous arbitration panel remained confidential. Nonetheless, the objection was held waived. *Id.* at p. 1486. Similarly, the objection that writers' identities should not have been kept confidential was observed by the Court to be a "procedural violation" under the CBA regulations but was waived by petitioner. *Ibid.* Again, the objection that petitioner was prevented from submitting certain evidence to the panel was weighed and, based on facts admitted by his attorneys in the district court -- summary judgment was upheld. Petitioner further objected that certain materials submitted were not considered and materials which should not have been considered were. The Ninth Circuit found the objections, essentially, waived. Id. at 1487.[7]

The importance of *Marino* is in establishing *the laundry list of errors and omissions committed not by petitioner, but respondent law firm and its members,* in representing him before the WGA and the District

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[7] Other objections made by petitioner in his Objection Letters were not even raised before the District Court. For example, WGA procedures require that all arbitrator decisions be in writing and signed. One of the three arbitrators never signed a decision. Given the 1-1 split of the other arbitrators, this was a critical irregularity and should have caused a different credit determination in the WGA. See discussion, infra, for a more exhaustive list of issues raised in the Objection Letters.

Court. Petitioner could have obtained screen credit if he had the opportunity to participate in a Phase I hearing as described in *Marino*. "Common factual disputes" were to be resolved. Disputes as to "authenticity, identification, sequence, authorship, or completeness of any literary material to be considered" would be resolved by the Phase I hearing committee. These terms were plain to the Ninth Circuit and California courts have overstepped their subject matter jurisdiction in construing them in a manner which destroyed petitioner's rights under LMRA § 301 and related law.

REASONS FOR GRANTING THE PETITION

A. This Court may properly address the preemption issue and provide relief. *BlueCross and BlueShield of Maryland, Inc.* v. *Weiner*, 868 F.2d 1550 (11th Cir. 1989); *Olson Farms, Inc.* v. *Barbosa*, 134 F.3d 933 (9th Cir. 1998). Where preemption is *complete*, the issue is jurisdictional and may be raised at any time. See e.g., *International Longshoremen's Association* v. *Davis*, 476 U.S. 380, 408 (1986).

B. The decision of the California Supreme Court denying review of the Court of Appeal not only represents a grave injustice to petitioner, but also adversely affects the rights of all members of the WGA. *The WGA, as a certified collective bargaining, unit represents more than **30,000 members***. The decision of the California Supreme Court, refusing to correct the intrusion of California state courts into an area completely preempted by the District Courts, will have pervasive, negative effects in the entertainment

industry. The industry operates on a series of CBAs with numerous professional guilds, of which the WGA is only one example. The power of the District Courts to construe and interpret the applicable CBAs controlling the entertainment industry, without officious intermeddling by state courts, must be protected. In addition, the California judgment in this matter represents a decision inconsistent with that of the Ninth Circuit Court of Appeals in *Marino* v. *Kenoff & Machtinger, supra,* which must be corrected.

C. Principles of *stare decisis* must be enforced. In addition to acting in excess of its jurisdiction in construing the CBA and the procedures thereunder, the trial court failed to follow the findings of the Ninth Circuit in *Marino, supra,* regarding the meaning of a Phase I hearing. *Marino* represented controlling law on the same CBA, the same Petitioner, and the same nucleus of operative facts. Only because respondent was not a party to the action does the decision not have *res judicata* or *collateral estoppel* effect. Under the principal of *stare decisis,* however, the trial court should have hewed to *Marino.* More importantly, the Supremacy Clause of the U.S. Constitution provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

> or Laws of any State to the Contrary notwithstanding."

U.S. Constitution, Art. VI, Sec. 2.

D. The balance of the claims were resolved by summary judgment relying upon *Ferguson* v. *WGA*, (1991) 226 Cal.App.3d 1382, an intermediate state court of appeal. However, *Ferguson* is limited on its face to the allegation that the arbiter anonymity feature of the WGA arbitration proceedings is fundamentally unfair. The California courts misconstrued *Ferguson* as determining whether other aspects of the WGA arbitration procedures were unfair. Petitioner's objections to the WGA procedures were wide-ranging and dealt with issues other than arbiter anonymity. Those objections are embodied, *inter alia*, in the "Objection Letters" referred to by the Court of Appeals in its December 10, 2001 opinion at p. 7. The Objection Letters detail other grounds for unfairness and bias deemed "waived" by petitioner by the Ninth Circuit and which were the result of respondents' professional negligence in the handling of the WGA proceedings and the federal court action. Triable issues of fact exist as to whether respondents were professionally negligent was in failing to, *inter alia*, present the Objection Letters to the U.S. District Court in the federal action to vacate the WGA arbitration award for bias and unfairness. These bias and unfairness issues include the following:

> 1. Petitioner complained in his Objection Letters that WGA special procedures for production executive credit were not followed generally;

2. Petitioner complained in his Objection Letters that WGA proscriptions against advertising of screenwriting credits prior to conclusion of the WGA arbitration were not enforced and that widespread advertising of "Godfather III" credits prejudiced Petitioner in the arbitration and demonstrated evidence of bias and unfairness;

3. WGA requirements, that production executives seeking screenwriting credit must serve a letter on all other writers assigned to the script or be precluded from obtaining screenwriting credit, were not met;

4. WGA requirements that production executive claims must be corroborated by any co-writer, in a writing filed with the WGA, were not met;

5. WGA requirements that a production executive seeking credit must demonstrate in writing in a detailed fashion that he authored more than 60 percent of the screenplay to obtain credit were not met;

6. Over 34 treatments, statements, and other written materials were evaluated and screenwriting credit awarded to the production executive and his co-writer in only eight days, a fact which bespeaks fundamental unfairness.

The decisions of the California state courts should have addressed *all* grounds set forth in the Objection Letters and whether triable issues of fact exist as to whether respondents are liable for negligence in not, at a minimum, at least asserting those objections in the federal court action and making the Objection Letters part of the record in that action.

E. Similarly, the California courts placed undue reliance upon a California Court of Appeal decision which also improperly construes and interprets the WGA CBA, in excess of its subject matter jurisdiction. The State Court Decision in *Ferguson* v. WGA must fall to the Ninth Circuit Court of Appeals in *Marino* v. *WGA, supra,* given the complete preemption of CBA interpretation. As the discussion, *supra,* makes clear, under the principles discussed, supra, the *Ferguson* decision must give way to the federal law established in *Marino*. *Ferguson* was a California Court of Appeal decision in which screenwriter Ferguson sought vacation of an arbitration award following a WGA credit arbitration. *Ferguson* filed in Los Angeles Superior Court, claiming the process was fundamentally unfair. He sought to have the award set aside on garden-variety California arbitration law principles. Clearly, however, *Ferguson* represents a CBA breach and fair representation case filed in the wrong forum. It does not and cannot represent controlling authority as to whether the CBA arbitration procedures are fundamentally fair or unfair. That is the role of the federal courts. Despite the obvious lack of subject matter jurisdiction in *Ferguson*, the Court of Appeals below affirmed the grant of summary judgment on that single case, finding that as a matter of

law, *Ferguson* barred recovery on the arbiter anonymity issue, violating Ferguson's federal statutory and common law labor rights.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATES OF
CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

NICK MARINO,
Plaintiff and Appellant,

V.

KENOFF & MACHTINGER,
Defendant and Respondent.

B 142506 (Los Angeles
County Super. Ct.
No. BC 109265)

COURT OF APPEAL SECOND DIST.
FILED
DEC 10 2001
JOSEPH A. LANE
Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest Hiroshige, Judge. Affirmed.

Henry Bushkin and David L. Casterline for Plaintiff and Appellant.

Wyman, Isaacs, Blumenthal & Lynne, Bruce Isaacs; and Nemecek & Cole, Frank W. Nemecek and Mary Redfield for Defendant and Respondent.

APPENDIX A

SUMMARY

This is the second time this case has come before us on appeal. In early 1999 Appellant, Nick Marino ("Marino") appealed the trial court's order granting summary judgment ("summary judgment #1") in favor of respondent law firm Kenoff & Machtinger ("K &M"). Marino's complaint alleged K&M committed legal malpractice in representing Marino in a Writers Guild of America ("WGA") credits arbitration and in a subsequent federal lawsuit against the WGA.

On the appeal of summary judgment #1, this Court concluded the trial court erred in adopting K&M's overly narrow construction of Marino's complaint. We also found the complaint disclosed other potential theories of liability not included in the summary judgment motion. These other theories of malpractice liability included: (1) whether Marino suffered damage as a result of K&M's failure to make certain objections in the WGA arbitration and in subsequent federal district court proceedings (the "Waiver" issue);[1] and (2) whether K&M's failure to

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[1] More specifically, the Waiver issue refers to K&M's alleged failure to assert "objections" before the WGA; and K&M's failure to submit evidence of "objections" Marino had asserted during the WGA arbitration in the subsequent proceedings (to vacate the arbitration) against the WGA in the federal district court. These "objections" included claims: (1) the WGA arbitration process was unfair because WGA used anonymous arbiters; and (2) the WGA arbiters were biased. In the federal case against the WGA, the Ninth Circuit held Marino had "waived" any "objections" to the arbitration and the arbiters because no such "objections" were timely raised during the arbitration or in the federal district court. In this litigation, Marino claims K&M's negligent conduct caused the "waiver" identified by the Ninth Circuit.

request a full "Phase One" hearing during the WGA arbitration damaged Marino (the "Phase One" issue). This Court reversed and remanded the case to the trial court (the "1999 Opinion").

Six months later, K&M tiled a second summary judgment motion ("summary judgment #2") on the Waiver issue and the Phase One issue; K&M sought to present new evidence and arguments not before the trial court on summary judgment #1. The trial court granted summary adjudication on the Waiver issue, but denied the motion with respect to the Phase One issue. The court determined that whether Marino suffered damage as a result of K&M's failure to request a Phase One hearing depended on the "scope and purpose" of a Phase One hearing. The court found triable issues as to the "scope and purpose" of a Phase One hearing warranting a trial on the Phase One issue.

The trial court subsequently granted K&M's motions *in limine:* (1) to preclude Marino from introducing evidence concerning the Waiver issue during the trial; (2) to bifurcate the trial on the Phase One issue; and (3) to conduct a bench trial on the "scope and purpose" of a Phase One hearing; the trial court concluded the issue of the "scope and purpose" of a Phase 1 hearing was a question of law for the court, rather than a jury. At the conclusion of the bench trial, the court found the evidence supported K&M's interpretation of the "scope and purpose" of a Phase One hearing. Therefore, the trial court concluded K&M failure to request a Phase One hearing did not damage Marino; the court subsequently entered judgment for K&M.

Now on appeal, Marino asserts, *inter alia,* the trial court erred: (1) in granting summary adjudication

on the Waiver issue; and (2) in conducting a bench trial to determine the "scope and purpose" of a Phase One hearing as a matter of law. Specifically, Marino claims the order granting summary adjudication on the Waiver issue violated "directives" in this Court's 1999 Opinion; Marino interprets the 1999 Opinion to "direct" the trial court to conduct a jury trial on the Waiver issue. Likewise, Marino maintains the trial court's "bench" trial on the Phase One issue violated this Court's 1999 Opinion; Marino contends the 1999 Opinion established the "law of the case" as to the "scope and purpose" of a Phase One hearing, obviating the need for a bench trial on the issue. In the alternative, Marino asserts the parties presented conflicting evidence on the "scope and purpose" of the Phase One hearing warranting a jury trial on the issue.

As set forth fully below, we conclude the trial court properly granted summary adjudication on the Waiver Issue. This Court's 1999 Opinion did not expressly direct the court to conduct a jury trial on the Waiver issue. Similarly, the 1999 Opinion did not establish the "law of the case" on the Phase One issue. Finally, we conclude the trial court properly resolved the Phase One issue as a matter of law. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Because this case is factually and procedurally complex, we set the facts out in detail.

Marino is a screenwriter, producer of theatrical motion pictures and a member of the WGA. In 1985, he and another writer wrote a screen treatment for the motion picture "Godfather III" and sold it to

Paramount Pictures Corporation ("Paramount"). Paramount then hired them to write a screenplay, which they also completed. Paramount chose not to produce it. In 1987, Marino, on his own initiative, wrote a second treatment for "Godfather III," which he submitted to producer Francis Ford Coppola ("Coppola") and executives at Coppola's production studio, Zoetrope. In 1989 and 1990, Coppola and Marino *Puzo* ("Puzo"), the creators of Godfather I and II, co-wrote a screenplay for "Godfather III." Paramount purchased the Coppola and Puzo screenplay. Thereafter, Paramount produced and released "Godfather III."

WGA Arbitration. Prior to the release of the picture, the WGA notified Marino it would conduct an arbitration to determine screenwriting credits for "Godfather III," pursuant to the collective bargaining agreement between the WGA and employers of writers in the movie industry.[2]

The collective bargaining agreement included a portion entitled, "Theatrical Schedule A, Theatrical Credits," which sets forth, the general rules for credit determination. The WGA "Credits Manual" outlines the arbitration procedures used to resolve credit disputes.[3]

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2 An automatic credit arbitration was triggered since a director or producer of the picture also claimed to be one of the writers.

3 In Phase One of a credits arbitration, the WGA Credits Arbitrator Secretary solicits scripts, outlines, story materials and other source materials from the studio, all of the writers and any party claiming a writing credit for the film. Once these materials are gathered together they are submitted to the Phase Two arbiters for their consideration during the credits determination.

K&M advised Marino during the WGA arbitration. Marino submitted written materials, including his 1985 screen treatment to the Phase One special committee. Marino did not, however, request a full evidentiary Phase One hearing. In November 1990, WGA notified Marino the Phase Two arbiters had determined Coppola and Puzo would receive sole writing credit for the "Godfather III." Marino requested a review hearing before the Phase Three Policy Review Board. Marino objected to the decision and the arbitration procedure itself.[4] The Board

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According to the WGA Credits Manual, a full Phase One hearing is conducted in the event a dispute arises as to the "authenticity, identification, sequence, authorship or completeness of any literary material to be considered" by the arbiters in Phase Two of the arbitration. At the Phase One hearing conducted by a special 3-member committee, "all participating writers may present testimony and documentary evidence." The special committee's determination as to these factual disputes is binding on the three arbiters who conduct. Phase Two.

Phase Two involves credit arbiters determining who, among competing writers, should get screen credit for the screenplay at issue. The three arbiters are anonymous; the identities of the arbiters are not disclosed to the parties.

Phase Three involves a Policy Review Board determining whether the assignment of screen writing credits seriously deviates from WGA policy or procedure as outlined in the Credits Manual.

[4] Among other things, Marino sought to have the arbiters consider his 1987 screen treatment. The WGA determined the 1987 screen treatment fell outside the scope of the collective bargaining agreement because Marino was not employed or hired by a signatory company (to the collective bargaining agreement) to write the 1987 screen treatment. Thus, the WGA refused to

informed him the arbitration decision was final.

Suit against WGA. In December 1990, Marino sued WGA in state court to vacate the arbitration award. K&M represented Marino in this suit. WGA removed the matter to the federal district court because WGA proceedings are governed by a collective bargaining agreement.

The WGA moved for summary judgment. In response, K&M, on behalf of Marino, argued the WGA arbitration was biased and unfair because, among other reasons, WGA used anonymous arbiters. The federal district court granted WGA's motion. The court concluded the Credits Manual provided for a Phase One hearing to resolve factual disputes. The trial court found the "hearing is fundamentally fair if it meets the 'minimum requirements of fairness' - adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." The court relied on *Ferguson v. WGA* (1991) 226 Cal.App.3d 1382 as dispositive on the issue of the fairness of the WGA proceedings.

Marino appealed to the Ninth Circuit. He argued the arbitration was unfair and biased, and the arbiters should have considered his 1987 treatment and 1985 screenplay. In May 1993, the Ninth Circuit found Marino had *waived* claims of fairness and bias by not making the appropriate objections before the arbiters. The court concluded a "party may not sit idle through an arbitration procedure and then collaterally attack the procedure on grounds not raised before the arbitrators when the result turns out to be adverse."

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consider the 1987 screen treatment as a part of the credits determination.

Suit against Coppola, et al. In 1993, while Marino's case against the WGA was pending in the Ninth Circuit, Marino filed a lawsuit in the state court against Coppola, Puzo, Zoetrope and Paramount, raising various actions.[5] The trial court sustained defendants' demurrer to all counts without leave to amend. The court concluded Marino's claims were preempted by the collective bargaining agreement and barred by res judicata since they were already adjudicated in the WGA credit determination.

Suit against K&M. After the action against Coppola was dismissed, Marino filed the instant action against K&M for legal malpractice. Marino alleged K&M breached its duty of care in representing him in WGA and federal court proceedings. He asserted K&M's performance fell below the standard of care: (1) when K&M failed to advise and represent Marino properly in the credit arbitration, causing him to lose screenwriting credit and compensation, and causing him to waive his rights to challenge the arbitration and pursue claims in other forums; and (2) when K&M failed to advise him regarding his "prospects for success" on his appeals from the arbitration decision.[6]

Summary Judgment #1. K&M filed a motion for summary judgment. K&M framed its summary

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[5] Marino alleged the following claims: breach of contract, misrepresentation, copyright infringement, unauthorized use, and unjust enrichment and constructive trust.

[6] After Marino filed this malpractice action, the state appellate court reinstated his claims against Coppola relating to his 1987 treatment for the movie, thus staying (for a time) the instant action for malpractice. Marino settled this lawsuit with Coppola.

judgment motion on the factual contentions Marino asserted in interrogatory responses. In an interrogatories requesting Marino to "state all facts" supporting his malpractice claim, Marino responded K&M: (1) failed to advise him to request a full Phase One hearing; (2) failed to submit his 1987 screen treatment for consideration at the arbitration hearing; (3) failed to timely advise him to pursue a misappropriation claim against Puzo, Coppola, and Paramount; and (4) failed to advise Marino as to the unlikely prospect for success at subsequent hearings and appeals challenging the arbitration.

In the summary judgment motion K&M argued its performance did not fall below the standard of care. K&M asserted its advice to forego a Phase One hearing regarding the 1987 treatment could not have damaged Marino since the Ninth Circuit and the state Court of Appeal both held the 1987 treatment was outside the scope of the WGA's jurisdiction and could not be considered as part of the WGA's credit determination. K&M also maintained issue preclusion barred Marino from re-litigating the issue in his a malpractice claim. In addition, K&M argued it filed an unjust enrichment claim, contrary to Marino's assertion it failed to advise him to pursue a misappropriation claim. Furthermore, K&M asserted it had no duty to guarantee Marino success on his claims.

In opposition to K&M's motion, Marino submitted his declaration describing K&M's substandard performance. Specifically, Marino claimed he had written three letters to the WGA objecting to the arbitration process while the arbitration was pending (the "Objection Letters") and K&M had the Objection Letters but failed to introduce them in the federal

district court proceedings. Marino did not, however, attach copies of the Objection Letters to his declaration. Marino also argued the Ninth Circuit's finding he had *waived* his objections to the arbitration was based on K&M's failure to submit the Objection Letters in the district court.

Nonetheless, the trial court agreed with K&M and granted the summary judgment #1. The court found Marino could not demonstrate K&M's conduct damaged him. The court, interpreted the complaint narrowly as alleging damages only in connection with the 1987 treatment and not alleging damages in connection with the 1985 treatment. Since WGA had no jurisdiction over the 1987 treatment, the trial court concluded Marino could not have been damaged based on these allegations. The court also found federal law may have granted Marino different and/or greater relief than afforded under state law. The court also rejected Marino's contention K&M's failure to amend the complaint to add a misappropriation claim caused him damage. Marino appealed.

The 1999 Opinion. In June 1999, this Court reversed. We concluded Marino could not pursue his claims based on the 1987 screen treatment. We also rejected Marino's malpractice theories of liability centering on: (1) K&M's failure to advise Marino on the "unlikely prospects for success" in his appeals; and (2) K&M's failure to advise him to pursue a misappropriation claim against Puzo, Coppola, and Paramount.

Nonetheless, this Court found the trial court had erred in adopting K&M's narrow construction of the complaint as asserting a malpractice claim based solely on the 1987 screen treatment. This Court interpreted

the complaint broadly as alleging other potential theories of liability, including a possible malpractice claim related to his 1985 treatment, which K&M had not addressed in summary judgment #1. Furthermore, we determined the parties' differing views concerning a Phase One bearing raised a question of fact, which, based on the scant and incomplete record before this Court at the time, precluded summary judgment.[7] We held: "[A] triable issue of material fact exists as to the purpose of a Phase One hearing and whether the failure to request one caused Marino to lose screenwriting credit and compensation under his contact with Paramount."

Concomitantly, we found there was insufficient evidence in the record to determine, as a matter of law, the "Waiver" issue (i.e., whether Marino suffered damage as a result of K&M's failure to: (1) assert fairness objections before the WGA; and (2) submit the Objection Letters in subsequent proceedings against the WGA in the federal district court).

This Court remanded the case, directing the trial court to deny the motion for summary judgment.

Summary Judgment #2. In December 1999, K&M filed another motion for summary judgment. K&M asserted summary judgment on the Waiver issue and the Phase One issue was appropriate because

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[7] Neither party presented evidence defining the "scope and purpose" of a Phase One hearing. For instance K&M did not submit the WGA Credits Manual into evidence. The only evidence in the record was a description of the Phase One hearing contained in the Ninth Circuit's decision in the WGA suit. This Court held the Ninth Circuit's description was not exhaustive and therefore it was insufficient to define the "scope and purpose" of Phase One as a matter of law.

neither issue had been squarely raised, or fully briefed and argued on a complete record on summary judgment #1. In support of summary judgment #2, K&M presented the Credits Manual and the declaration of the director of the Credits Administration for the WGA.

K&M asserted no triable issue of fact existed as to the Waiver issue because Marino was not damaged by K&M's alleged failure to assert objections. K&M argued even if it had raised Marino's objections challenging the anonymity of the arbiters, the objections would have failed because the fairness of using anonymous arbiters was already decided in *Ferguson* v. *WGA surpa.* 226 Cal.App.3d 1382. K&M also argued the claims based on the Phase One issue and the Waiver issue were time-barred by the one year statute of limitations; K&M contended that since Marino's claims were tied to the May 1993 Ninth Circuit decision in the WGA suit, Marino's July 1994 legal malpractice it filed more than a year later was untimely.[8]

The trial court granted summary adjudication on the Waiver issue. The court found "no triable issue of fact exists as to whether plaintiff could have suffered any damages as a result of K&M's failure to file objections." In so ruling, the Court considered the

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[8] Below the trial court concluded triable issues of fact existed as to the statute of limitations bar, precluding summary judgment. K&M did not file a cross appeal on the statute of limitations issue. Consequently, we decline to decide the merits of this issue because K&M did not properly preserve it for appeal. In any event, in view of our conclusion affirming the judgment, it is unnecessary to address K&M's claim it was entitled to summary judgment based on the statute of limitations.

Objection Letters referred to in Marino's declaration; Marino claimed these letters contained timely and relevant "objections" to the WGA arbiter's unfairness and bias; and K&M's failure to present the letters in the subsequent district court proceedings resulted in Marino *waiver* of his claims against the WGA. The trial court concluded, however, the Objection Letters did not assert any relevant objections; the Objection Letters did not object based on "arbiter bias." In addition, the trial court rejected Marino's claim he had the right to know the identities of the Phase Two arbiters, as *Ferguson v. WGA, supra,* 226 Cal.App.3d 1382 and *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, had disposed of this issue. Thus, the trial court determined even if K&M had objected and submitted the Objection Letters (i.e., *not* waived such objections) the arbitration proceedings would have continued and the outcome of the credits determination would not have changed.

As to the Phase One issue, the Court denied K&M's motion for summary adjudication. The trial court concluded there was a triable issue as to the "scope and purpose" of the Phase One hearing.

Motions in Limine. Prior to the trial on the Phase One issue, K&M filed various motions in limine. Among them, K&M sought to preclude Marino from attempting to re-litigate the Waiver issue to the extent the trial court had already granted summary adjudication on the issue. Marino opposed the motion by arguing this Court's 1999 opinion permitted him to introduce waiver evidence. The trial court grunted K&M's motion, precluding Marino from submitting evidence of waiver.

K&M also filed a motion in limine seeking to bifurcate the trial and to conduct a bench trial on the

issue of the "scope and purpose" of the Phase One hearing. K&M argued a separate bench trial was warranted because the determination of the "scope and purpose" of a Phase One hearing involved the interpretation of the collective bargaining agreement which posed a question of law for the court, rather than a question of fact for a jury. K&M asserted that if the court adopted Marino's view of the "scope and purpose of the Phase One hearing, then a jury could decide whether K&M's conduct (in failing to advise Marino to seek a full Phase One hearing) damaged Marino. The court granted the motion in limine and bifurcated the trial.

Bench trial. In March 2000, the trial court conducted a five-day bench trial to determine the "scope and purpose" of a Phase One hearing. During the trial, the court heard testimony from representatives of the WGA and from outside experts. Marino asserted the Ninth Circuit already determined the issue when it noted a Phase One hearing provided for all of "the usual confrontation and evidentiary rights."

K&M argued no confrontation and evidentiary rights were available to a writer at a Phase One hearing. K&M's witnesses testified the purpose of Phase One was not to permit script comparisons to determine who authored the movie; rather, the only purpose of Phase One was to determine the literary materials to be provided to the Phase Two arbiters for the credits determination.

In April 2000, the trial court issued its decision. The court concluded Marino had failed to establish he would have been able to contest the authorship of the subject screenplays at a Phase One hearing. In other

words, in the trial court's view, Marino failed to prove the "scope and purpose" of the Phase One hearing corresponded to his interpretation. Thus, the court found any failure of K&M to request a full Phase One hearing would not have resulted in a determination Marino should received screen credits during Phase Two. The court concluded ultimate credit determination (i.e., who generated the creative ideas in the final shooting script) was a Phase Two (not, as Marino claimed, a Phase One) function. The court held its "ruling would obviate the necessity of having a second phase, a jury trial, to determine whether the attorney defendants committed legal malpractice since the one theory of malpractice is hereby eliminated." The trial court decided Marino's theory of the case was predicated upon an inaccurate characterization of a Phase One hearing, and that a proper Phase One hearing would not have changed the outcome of the Phase Two arbitration.

The trial court subsequently entered judgment for K&M.

Marino appeals.

DISCUSSION

On appeal, Marino argues the trial court's order granting summary adjudication and order in limine in favor of K&M on the Waiver issues materially vary from the directives of this Court's 1999 Opinion and are, therefore, in excess of jurisdiction and void. Moreover, Marino asserts the trial court erred by granting K&M more relief than it sought on the summary judgment motion and on the *in limine* motion on the Waiver issue. Lastly, Marino contends the trial

court erred in conducting a bench trial on the "'scope and purpose" of the Phase One hearing rather than applying the "law of the case" on the issue as established in the 1999 Opinion. In the alternative, Marino asserts the court erred in determining the issue as a matter of law because there was conflicting evidence on the "scope and purpose" of the Phase One hearing warranting a jury trial. We examine each of these claims in turn.

1. The Trial Court Old Not Err in Disposing of the Waiver Issue.

On appeal, Marino claims the trial court ignored and violated this Court's directive (in the 1999 Opinion) to deny summary judgment. Marino asserts this Court held Marino was entitled to a full jury trial on the Waiver issue. Marino derives this contention from the statement in the 1999 Opinion that, Marino had raised "triable issues" precluding summary judgment #1. In our view, however, Marino misreads our 1999 Opinion as giving him an absolute right to submit the Waiver issue to a jury.

In the 1999 Opinion, we directed the trial court to deny the summary judgment motion because the trial court and K&M had misconstrued the complaint as focusing solely on the 1987 screen treatment. K&M framed summary judgment based on Marino's responses to interrogatories; and because in the interrogatories responses Marino failed to identify the Waiver issue as a potential theory of liability, K&M's summary judgment #1 did not address or offer any evidence concerning the Waiver issue. Marino raised the Waiver issue in his opposition to the motion and

supported the claim with his declaration. His declaration contained the assertion he had the Objection Letters and K&M had failed to introduce them in the federal district court. Marino did not, however, attach copies of the Objection Letters to his declaration, nor does his declaration reveal the substance of the Objection Letters or the nature of the objections.

Nonetheless, in view of his declaration, we concluded the Waiver issue remained an open matter and based on the record before us then, we found summary judgment was inappropriate.[9] Significantly, however, in remanding the mater to the trial court in 1999, we did not hold Marino had a right to submit the Waiver issue to a jury. Accordingly, we conclude the trial court did not violate this Court's directives when the trial court considered K&M's summary judgment #2 on the Waiver issue.

In addition, the trial court's consideration of summary judgment #2 did rot run a foul of the prohibition against successive summary judgment motions. Pursuant to Code of Civil Procedure section 437c, subdivision (f)(2), a party may not move for summary judgment based on issues asserted in a prior motion denied by the court, *unless* the party shows new evidence or circumstances supporting the new motion, (Code Civ. Proc., § 437c, subd. (f)(2).) Here, on summary judgment #2, K&M showed new evidence

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[9] Likewise, we determined the parties' differing views concerning a Phase One hearing raised a question of fact, which, based on the incomplete record before this Court at the time, precluded summary judgment. Indeed, at the time, neither party had even presented evidence defining a Phase One hearing.

and circumstances to warrant "reassertion" of the Waiver issue. The evidence on the Waiver issue was not fully developed, presented or argued on summary judgment #1. In fact, the Waiver issue did not even fully crystallize until this Court identified it as a potentially viable theory of liability in the 1999 Opinion. As the trial court noted below, the Waiver issue had never been squarely presented or completely briefed for the trial court on summary judgment #1. In reviewing summary judgment #2 on the Waiver issue, the trial court had new evidence that neither it nor this Court had in the record on summary judgment #1. Specifically, in connection with the summary judgment #2, the trial court (for the first time) was presented with evidence of the Objection Letters. The trial court reviewed the letters and concluded none of them contained relevant objections on "arbiter bias." Thus, the trial court properly considered K&M 's summary judgment #2.[10]

Furthermore, we conclude the trial court properly granted summary adjudication on this issue and on K&M's motion *in limine* as to the Waiver issue.[11]

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[10] Even were we to conclude Code of Civil Procedure section 437c, subdivision (f)(2) *did not* authorize K&M to file summary judgment #2 on the Waiver issue, we would nonetheless affirm the judgment. In view of the evidence in the record (presented in support of summary judgment #2) on the Waiver issue, we conclude K&M would, at the very least, have been entitled to a non-suit on this malpractice claim.

[11] Because we conclude Marino's waiver evidence does not support a viable claim for malpractice, we likewise find that the trial court properly granted the *in limine* motion to exclude the waiver evidence from the subsequent Phase One trial. In our view, the waiver evidence was not legally or factually relevant to any

We agree with the trial court; K&M met its burden of proof on summary adjudication. K&M demonstrated that even if it had asserted the "objections" on behalf of Marino during the WGA proceedings, the outcome would have been the same--Marino would not have obtained a screen writing credit. K&M showed no triable issues of fact existed as to whether Marino suffered any damages as a result of K&M 's failure to assert objections based on the unfairness of the WGA arbitration. The Supreme Court in *Ferguson* v. *WGA, supra,* 226 Cal.App.3d 1382 determined that it was not unfair to use anonymous arbiters in the WGA process, Therefore, the trial court appropriately found Marino could not have suffered any damage for K&M's alleged failure to object on these fairness grounds; raising the anonymity objections would have been futile. Moreover, as to Marino's claim he suffered damage because K&M failed to present his Objection Letters in the district court, as set forth above, K&M demonstrated the letters did not contain any relevant objections.

Hence, K&M disproved the element of damages on Marino's malpractice claim based on this theory of liability and the trial court properly granted summary adjudication on the issue of Waiver.[12]

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matter at issue in the Phase One hearing.

[12] Marino's theories of malpractice liability, the Waiver issue and the Phase One issue, are independent and distinct. For the purposes of summary adjudication, they constitute *two separate* causes of action for malpractice, which we review and dispose of separately. (See *Lilienthal & Fowler* v. *Superior Court (Karr)* (1993)12 Cal.App. 4th 1848, 1854 [in the context of summary adjudication, separate wrongful acts *give* rise to "separate causes of action,"

2. Trial Court did not Grant More Relief than K&M Requested.

Marino asserts the trial court erred in granting K&M more relief than it sought in summary judgment #2, without giving Marino notice and an opportunity to respond. Marino claims K&M sought *limited* relief. Marino asserts K&M requested only a ruling that the use of anonymous arbiters during Phase Two of the WGA arbitration process was unfair. Accordingly, Marino claims K&M merely requested Marino be precluded from producing any evidence at trial that the WGA arbitration was unfair.

We disagree. K&M's summary judgment #2 did not seek only a limited ruling on the justiciability of the fairness of the WGA arbitration process. Instead, K&M sought to demonstrate its entitlement to summary judgment on the entire Waiver theory of liability. K&M sought to prove its failure to object or submit evidence of Marino's objections (based on the purported unfairness of the WGA arbitration) did not damage Marino. In other words, K&M endeavored to show it did not cause Marino to *waive* any viable claims through its conduct.

The trial court, in granting summary adjudication, concluded no triable issues of fact existed as to whether Marino could have suffered any damages as a result of K&M's purported waiver of objections. The trial court's disposition was, therefore, consistent with the relief K&M sought in the motion.[13]

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irrespective of the manner of pleading; the court may grant summary adjudication on one and not the other].)

[13] Contrary to Marino's assertion, the trial court did not grant summary judgment on an issue not raised by the moving

3. The Trial Court Properly Resolved The Phase One Issue.

The trial court determined that whether Marino suffered damage as a result of K&M's failure to request a Phase One hearing depended on the "scope and purpose" of a Phase One hearing. In denying summary adjudication or the Phase One issue, the court found triable issues as to the "scope and purpose" of a Phase One hearing warranting a trial on the matter. The trial court subsequently granted K&M's motions *in limine* to bifurcate the trial on the Phase One issue and to conduct a bench trial on the "scope and purpose" of a Phase One hearing. The trial court concluded the issue of the "scope and purpose" of a Phase 1 hearing was a question of law for the court, rather than a question of fact for the jury. At the conclusion of the bench trial, the trial court found the evidence supported K&M's interpretation of the "scope and purpose" of a Phase One hearing. Therefore, the court concluded K&M failure to request a Phase One hearing did not damage Marino.

On appeal, Marino asserts the court erred in conducting a bench trial to determine the "scope and purpose" of a Phase One hearing. Specifically, Marino maintains the bench trial violated this Court's 1999 Opinion; Marino contends the 1999 Opinion established the "law of the case" as to the "scope and purpose" of a Phase One hearing, obviating the need for a bench trial on the issue. In the any event, Marino asserts conflicting evidence on the "scope and purpose" of the

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party. Therefore, the trial court was not required to provide Marino the opportunity to respond to any new issues.

Phase One hearing warranted a jury trial on the issue. Both of these contentions lack merit.

A. The 1999 Opinion did not Establish "Law of the Case."

Marino claims the trial court erred by not applying the "law of the case" established in the 1999 Opinion. Marino asserts this Court established the "law of the case" by adopting the Ninth Circuit's explanation of the WGA Phase One hearing.

We disagree. In our view, the doctrine of "law of the case" does not apply. Our 1999 Opinion does not set forth any ruling as to the "scope and purpose" of a Phase One hearing. Indeed, the appellate record at that time did not contain sufficient evidence for us to opine on the issue. Moreover, we did not adopt the Ninth Circuit's explanation of the Phase One hearing, nor did we recognize the Ninth Circuit's definition of a Phase One hearing as exhaustive. As we noted in the opinion:

> "We simply hold on the record before us, a triable issue of material fact exists as to the purpose of a Phase One hearing and whether the failure to request one caused Marino to lose screenwriting credit compensation under his contract with Paramount."

Thus, our instructions to the trial court to deny the first summary judgment were based on K&M's failure to meet its burden; K&M did not present sufficient evidence for us to rule on the Phase One issue as a matter of law. Consequently, we did not establish

"law of the case" and the trial court's independent determination of the "scope and purpose" of the Phase One hearing did not violate the 1999 Opinion.

B. The Trial Court Acted Properly in Conducting a Bench Trial on the Phase One Issue.

Marino asserts the trial court erred in conducting a bench trial on the Phase One issue and in determining the "scope and purpose" of the Phase One hearing as a matter of law. He claims conflicting evidence existed as to the "scope and purpose" of Phase One hearing; and therefore a jury, rather than the court should have resolved the issue. We disagree.

The trial court was authorized to construe and rule upon "scope and purpose" of the Phase One hearing. The determination of the "scope and purpose" of the Phase One bearing required the interpretation of the WGA collective bargaining agreement. Generally, the interpretation of a collective bargaining agreement, including the consideration of extrinsic evidence on the matter, is a judicial function. (See, e.g., *Operating Engineers Pension Trusts* it *B&E Backhoe, Inc.*, (9th Cir. 1990) 911 F.2d 1347, 1352.)

Even, however, under the basic rules of contract interpretation the trial court acted properly. In considering a question of contract interpretation, the court considers whether the contract's language is "reasonably susceptible" to the interpretation urged by the parties. To make this determination, the court first provisionally considers all of the evidence offered by the parties. If the court decides contract language is ambiguous and therefore "reasonably susceptible" to

the interpretation urged, the court turns to the second step– interpretation of the contract. *(Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

The trial court's resolution of the first step – whether an ambiguity exists – is a question of law subject to independent review on appeal. In addition, the second step --the court's actual interpretation of the ambiguous language -- is also a question of law where no extrinsic evidence is introduced to interpret the contract or the extrinsic evidence does not conflict. (Winet *v. Price (1992) 4* Cal.App.4th 1159, 1165-1166.)

Here, the trial court determined an ambiguity existed as to the "scope and purpose" of a Phase One hearing since the language of the agreement was "reasonably susceptible" to the interpretation urged by each party. Marino argued a full Phase One hearing allows script comparisons to determine which writer is the source of the artistic ideas contained in the final shooting script. Thus, Marino maintained because K&M failed to advise him to seek a full Phase One hearing, Marino lost the opportunity to demonstrate he was entitled to a screen credit.

K&M asserted, however, the only purpose of Phase One is for the WGA to gather together all of the materials to be submitted to the Phase Two arbiters for review. The Phase Two arbiters then read the materials to determine which writer is to receive screenwriting credit. K&M maintained, only when there is a dispute as to the authorship of the materials *to be submitted* to the Phase Two arbiters (as opposed to a dispute, as in this case, concerning the authorship of the final shooting script) a full Phase One hearing is necessary to resolve the dispute. Because here, all the relevant materials were submitted to, and considered by the

Phase Two arbiters, and because there was no dispute as to the authorship of the materials to be submitted to Phase Two, K&M asserted it was unnecessary to request a full Phase One hearing and its failure to do so could not have damaged Marino.

The trial court considered expert testimony to interpret to the "scope and purpose" of the Phase One hearing. The court concluded the extrinsic evidence on the "scope and purpose" of Phase One did not genuinely conflict. Based on its view of the evidence, the trial court found Marino's witnesses were not credible. The court determined K&M's witnesses had experience with Phase One hearings and knowledge about WGA's procedural custom and practice while Marino's witnesses did not have similar relevant experience or expertise. For example, the court found one of Marino's experts, Molly Wilson, did not offer probative testimony as to the scope of a Phase One hearing since she never participated in such a hearing during her career. All of the expert witnesses who testified during the trial, with the exception of Wilson, endorsed K&M ' s version of the "scope and purpose" of the Phase One hearing. In short, because the extrinsic evidence did not conflict, then the trial court properly determined the "scope and purpose" of the Phase One hearing as a matter of law.

Furthermore, given the evidence, the court did not err in adopting K&M's interpretation of the "scope and purpose" of the Phase One hearing. Consequently, the trial court properly concluded K&M failure to request a full Phase One hearing did not damage Marino; and the court appropriately entered judgment in favor of K&M.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs incurred on the appeal.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:
LILLIE, P.J.
JOHNSON, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 7

DATE: January 7, 2002

David L Casterline
Casterline & Agajanian
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Suite 340
Manhattan Beach. CA 90266-6867

Nick Marino

v.

Kenoff & Machtinger

B 142506
Los Angeles County No. BC109265

THE COURT:

Appellant's petition for rehearing denied.

APPENDIX B

Court of Appeal, Second Appellate District, Division Seven - No. B142506

S103766

IN THE SUPREME COURT OF CALIFORNIA

En Banc

NICK MARINO, Plaintiff and Appellant,

v.

KENOFF & MACHTINGER, Defendant and Respondent.

Petition for review DENIED.

SUPREME COURT
FILED
MAR 13 2002
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE
Chief Justice

APPENDIX C

SEP 26 2002

OFFICE OF THE CLERK

No. 02-308

IN THE

Supreme Court of the United States

NICK MARINO,
Petitioner,

vs.

KENOFF & MACHTINGER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

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KENOFF & MACHTINGER

PARTIES TO THE PROCEEDING

Petitioner is Nick Marino, an individual member of the Writers Guild of America.

Respondent is Kenoff & Machtinger, a California partnership.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. The 1990 WGA Credit Arbitration 1

B. The WGA Credit Lawsuit, the Legal Malpractice Lawsuit and Summary Judgment No. 1 2

C. Summary Judgment No. 2 2

D. The 5-Day Bench Trial 3

E. Marino's Appeal and Subsequent Petitions 3

ARGUMENT 4

A. Marino's Malpractice Lawsuit, Which He Chose To File In State Court, Is Not A Claim Arising Under Section 301(a) Of The LMRA And His Claim That The Trial Court Acted In Excess Of Its Subject Matter Jurisdiction Is Without Merit 4

B. The California Judgment Is Consistent With, And Is Not In Conflict With, The Ninth Circuit Decision 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Caterpillar, Inc. v. Williams,
482 U.S. 386, 107 S.Ct. 2425 (1987) 4, 5

Ferguson v. WGA,
226 Cal.App.3d 1382 (1991) 9

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473, 101 S.Ct. 2870 (1981) 5

Moncharsh v. Heily & Blase,
3 Cal.4th 1 (1992) 9

Pan Am. Petroleum Corp. v. Superior Court,
366 U.S. 656, 81 S.Ct. 1303 (1961) 5

Pratt v. Paris Gas Light & Coke Co.,
168 U.S. 155, 18 S.Ct. 62 (1897) 5

Statutes

Labor Management Relations Act ("LMRA")
Section 301(a) 4, 6

INTRODUCTION

The Petition for Writ of Certiorari (the "Petition") filed by Nick Marino ("Marino"), in Pro Se, should be summarily denied because:

(a) The California Court of Appeal neither decided an important question of federal law that has not been, but should be, settled by this Court nor decided an important question of federal law in a way that conflicts with the relevant decisions of this Court.[1]

(b) The California Supreme Court did not decide an important federal question in conflict with the Ninth Circuit's decision in *Marino v. Writers Guild of America, East, Inc.*, 992 F. 2d 1480 (1993) (the "Ninth Circuit Decision").

STATEMENT OF THE CASE

A. The 1990 WGA Credit Arbitration

Marino claims that he was entitled to receive writing credit on the motion picture entitled "The Godfather: Part III" ("GF III"). In 1990, Marino was a party to a credit arbitration before the Writer's Guild of America, West, Inc. (the "WGA") concerning GF III (the "WGA Credit Arbitration"). WGA credit arbitrations consist of three phases. In Phase 1, written materials are assembled for the Arbiters who make the credit decision at Phase 2. On November 5, 1990, the Arbiters made their decision that Francis Ford Coppola and Mario Puzo should receive writing credit. Marino appealed the Arbiters decision at Phase 3, and after further consideration by one of the Arbiters regarding a certain literary material, Marino lost.

---

[1] After the Court of Appeal decision, Marino filed a Petition for Review with the California Supreme Court. The California Supreme Court denied Marino's Petition for Review.

B. The WGA Credit Lawsuit, the Legal Malpractice Lawsuit and Summary Judgment No. 1

On December 12, 1990, Marino filed a lawsuit against the WGA seeking a declaration awarding him a writing credit on GF III (the "WGA Credit Lawsuit"). The WGA removed the WGA Credit Lawsuit to federal court and then filed a motion for summary judgment which was granted against Marino.

Marino then appealed to the Ninth Circuit. The Ninth Circuit affirmed the grant of summary judgment in favor of the WGA and against Marino.

On July 22, 1994, Marino sued Kenoff & Machtinger ("K&M") for legal malpractice (the "Malpractice Lawsuit") in the Los Angeles Superior Court. Marino decided to file the Malpractice Lawsuit in state court. Marino then proceeded to litigate the Malpractice Lawsuit in state court for over eight years.[2]

In August of 1997, K&M filed a motion for summary judgment in the Malpractice Lawsuit ("SJ No. 1"). SJ No. 1 was granted in favor of K&M and against Marino. Marino appealed. The California Court of Appeal affirmed, in part, and reversed, in part.

C. Summary Judgment No. 2

On December 8, 1999, after remand, K&M filed another motion for summary judgment ("SJ No. 2"). In January of 2000, the trial court granted SJ No. 2, in part, and denied it, in part. The trial court ruled that there was a triable issue as to the purpose and scope of a Phase 1 Hearing in the WGA Credit Arbitration as that term is defined in the Credits Manual

---

[2] K&M is the sole remaining Defendant in the Legal Malpractice Lawsuit.

as approved by the WGA and its membership (the "Phase 1 Hearing Issue").

D. The 5-Day Bench Trial

The Los Angeles Superior Court conducted a 5-day bench trial concerning the Phase 1 Hearing Issue. The court heard testimony from representatives of the WGA and from outside experts concerning the interpretation of the Credits Manual and the nature, scope, purpose and effect of a Phase 1 Hearing. On April 26, 2000, the trial court issued its written decision and concluded that the credit determination of who was the genesis of creative ideas found in the final shooting script is a Phase 2 function, not a Phase 1 function. Further, the trial court reasoned that it would not make sense (or promote the stated goal of a swift determination of credit) to conduct a credit determination twice (once at Phase 1 and again at Phase 2). Judgment was entered against Marino on August 9, 2000. Marino filed a Notice of Appeal.

E. Marino's Appeal and Subsequent Petitions

On December 10, 2001, the California Court of Appeal affirmed the trial court's ruling. See Appendix A to Marino's Petition. On December 24, 2001, Marino filed a Petition for Rehearing before the Court of Appeal. On January 7, 2002, the Petition for Rehearing was denied. On January 22, 2002, Marino filed a Petition for Review before the California Supreme Court. On March 13, 2002, the Petition for Review was denied. The instant Petition before this Court followed.

ARGUMENT

A. Marino's Malpractice Lawsuit, Which He Chose To File In State Court, Is Not A Claim Arising Under Section 301(a) Of The LMRA And His Claim That The Trial Court Acted In Excess Of Its Subject Matter Jurisdiction Is Without Merit

(1) Marino makes an inconsistent argument. In his Petition, at pages 11-12, Marino argues that the trial court acted in excess of its jurisdiction by interpreting a collective bargaining agreement ("CBA"). However, Marino himself, on page 12 of his Petition, quotes from the Ninth Circuit Decision in which the Ninth Circuit held that "[t]he procedures for arbitration of credit disputes are set out in WGA's 'Credits Manual.' They are not part of the collective bargaining agreement, but are approved by WGA's board of directors and by vote of its membership." The Ninth Circuit drew a distinction between the general rules for determining credit, which are part of a CBA, and the arbitration procedures of credit disputes set forth in the Credits Manual, which are not part of a CBA. Thus, Marino's argument that the trial court exceeded its jurisdiction when it supposedly interpreted a CBA is devoid of merit, since the trial court interpreted the Credits Manual, not a CBA.

(2) Even if this case involved the interpretation of a CBA, instead of the interpretation of the Credits Manual, federal preemption does not apply where the interpretation of a CBA arises in connection with the *defense* of a state law claim. It is well settled that when a *defense* to a state law claim is based on the terms of a CBA, a state court is permitted to interpret that agreement in order to adjudicate the defenses raised in the state law claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386,

398-399, 107 S.Ct. 2425, 2433 (1987). As this Court has heretofore decided:

> "It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a Section 301 question, *in a defensive argument* does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint ... and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." (Emphasis added.) *Caterpillar v. Williams*, 482 U.S. at 398-399, 107 S.Ct. at 2433.

Pratt v. Paris Gas Light & Coke Co., 168 U.S. 155, 18 S.Ct. 62 (1897) [state court not deprived of power to determine questions arising under patent laws]. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84, n,12, 101 S.Ct. 2870 (1981) [this Court holds that "exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject matter over a case raising the question"]. *Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663, 81 S.Ct. 1303 (1961) [approving state court adjudication of defense based on Natural Gas Act].

(3) Marino's case is a garden variety tort claim (a legal malpractice action) arising under state law. It does not raise a federal question. Moreover, it is not an action for violation of a contract between an employer and a labor organization

and therefore Section 301(a) of the Labor Management Relations Act ("LMRA") does not even apply.

(4) Marino chose the state court forum. Marino decided to file the Malpractice Lawsuit in state court and he litigated his claim in state court for over 8 years. Now that Marino has received adverse rulings in state court, he raises objections to the jurisdiction of the very court that he chose, the Los Angeles Superior Court. Moreover, Marino fully participated in the trial, wherein he called expert witnesses to testify as to their interpretations of the Credits Manual. At no time did Marino assert before the trial court or before the Court of Appeal that those courts were without subject matter jurisdiction to interpret the relevant provisions of the Credits Manual. Marino's assertion now, after losing in the trial court and the California Court of Appeal, that the trial court engaged in an interpretive exercise reserved for the federal courts under Section 301 is disingenuous and devoid of merit. Marino should be estopped to even make such an argument at this point in time.

(5) Marino's malpractice claim does not turn on the interpretation of a CBA. His complaint simply alleges that K&M breached its duty of care in providing legal services to Marino by, among other things, failing to request a Phase 1 Hearing, thereby causing Marino to lose screenwriting credit. In its defense, K&M argued that its failure to request a Phase 1 Hearing could not have caused Marino's alleged damages. This defensive argument required the trial court to interpret the Credits Manual with respect to the scope and purpose of a Phase 1 Hearing. After a five day trial, the trial court ruled that the failure to request a Phase 1 Hearing could not possibly have caused Marino any damages. The California Court of Appeal affirmed. The California Supreme Court then denied review.

B. The California Judgment Is Consistent With, And Is Not In Conflict With, The Ninth Circuit Decision

(1) The Ninth Circuit Decision and the trial court decision (later affirmed by the California Court of Appeal) are consistent with each other. The Ninth Circuit Decision held that the WGA Credits Arbitration system is fundamentally fair because it contains various procedural safeguards. *Marino*, at 1484–1485. The Ninth Circuit Decision provides that a Phase 1 Hearing allows for confrontation and other evidentiary rights. *Marino*, at 1485.[3] However, the Ninth Circuit never reached the issue of what is proper Phase 1 Hearing subject matter. That issue was not before the Ninth Circuit in the Ninth Circuit Decision. In contrast, in the Malpractice Lawsuit, the trial court had to determine what is the proper subject matter for a Phase 1 Hearing. Therefore, the two decisions cannot possibly be in conflict because each addresses different issues.

(2) Both the Ninth Circuit and the trial court agree that a Phase 1 Hearing allows for due process rights. However, as the trial court ruled (and as affirmed by the California Court of Appeal), a Phase 1 Hearing can only be conducted as to certain issues. As the trial court ruled, a Phase 1 Hearing is proper to determine who "put pen to paper" so as to make sure that the correct literary materials are sent to the Arbiters at Phase 2. It is the Phase 2 Arbiters who then determine which screenwriters contributed which creative ideas and dialogue for the purposes of determining credit. In short, and as the trial court so ruled and as the Court of Appeal affirmed,

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[3] As the Ninth Circuit stated: "The former [a Phase 1 Hearing], of course, provides for all of the usual confrontation and evidentiary rights." The Ninth Circuit Decision contains no other reference to the nature, scope or purpose of a Phase 1 Hearing.

the credit determination function takes place at Phase 2, not at Phase 1.

(3) Marino argues, in his Petition at page 6, that after hearing evidence from many witnesses, including experts, the trial court issued its findings that the CBA procedures described by the Ninth Circuit did not, in fact, exist. This is a misstatement by Marino. The trial court never made any such finding. In fact, after conducting a bench trial on the Phase 1 Hearing Issue, the trial court found that a full Phase 1 Hearing is available to resolve disputes as to the authenticity, identification, sequence, authorship or completeness of literary materials to be submitted to the Phase 2 Arbiters for consideration. The trial court findings complement and clarify the Ninth Circuit description of a Phase 1 Hearing and confirm the plain meaning of the Ninth Circuit's ruling with respect to the arbitration procedures described in the Ninth Circuit Decision. As such, the trial court judgment in this case is not, in any way, in conflict with the Ninth Circuit Decision.

(4) Marino argued before the trial court that the WGA Credit Arbitration was unfair because he never knew the identities of the Arbiters who made the credit decision at Phase 2 (the "Anonymity of the Arbiters"). The trial court rejected this argument by Marino and granted K&M's motion for summary judgment on this issue. The Court of Appeal affirmed. This decision is likewise consistent with the Ninth Circuit Decision.

(5) In the Ninth Circuit Decision, the Court upheld the procedures of the WGA Credit Arbitration as fair and reasonable, but with one exception. The one exception was the claim of arbiter bias. The Ninth Circuit did not reach the issue of arbiter bias because those claims were not raised by Marino until after the Arbiters had ruled against him. Inasmuch as the Ninth Circuit simply did not reach the Anonymity of the Arbiters issue, then, at some point in the

Malpractice Lawsuit, the trial court had to reach that issue. The trial court did reach that issue, and did grant summary judgment as to that issue, because it was bound to follow *Ferguson v. WGA*, 226 Cal.App.3d 1382, 1389-1390 (1991) in which the California Court of Appeal ruled that the Anonymity of the Arbiters was a fair and reasonable procedure supported by important policy considerations. Thus, even if Marino had objected to the Anonymity of the Arbiters prior to the commencement of the arbitration (and it is undisputed that he made no such objection), the objection would have made no difference because the WGA arbitration procedure based on the Anonymity of the Arbiters had already been held to be proper.

(6) In addition, in *Ferguson*, the California Court of Appeal also held that claims relating to a WGA Credit Arbitration are nonjusticiable and are not subject to judicial review. Similarly, under California law in general, arbitrations are not subject to judicial review. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992). Marino's real goal in this case is to circumvent *Moncharsh* and the finality of the WGA Credit Arbitration system, which is binding on all WGA members (like Marino).

CONCLUSION

K&M respectfully requests that the Petition be denied.

Dated: September 27, 2002.

Respectfully submitted,

NEMECEK & COLE

JONATHAN B. COLE
Counsel of Record

Counsel for Respondent
KENOFF & MACHTINGER

Supreme Court, U.S.
FILED
OCT 10 2002
CLERK

No. 02-308

IN THE

Supreme Court of the United States

NICK MARINO,

Petitioner,

—v.—

KENOFF & MACHTINGER, LLP,
JAY KENOFF AND LEONARD MACHTINGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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12 pp

TABLE OF CONTENTS

TABLE OF CONTENTS..... (i)

TABLE OF AUTHORITIES..... (iii)

I. PRELIMINARY STATEMENT..... 1

II. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS ACTED IN EXCESS OF SUBJECT MATTER JURISDICTION..... 1

A. Complete Preemption is an Exception to the Well Pleaded Complaint Rule..... 1

B. The CBA Provisions Control the Credit Arbitration Procedures..... 4

C. Petitioner Preserved His Objection and is Not Estopped to Assert Them..... 5

D. Estoppel Will Not Defeat the Assertion of a Claim of Complete Preemption..... 6

E. The Longevity of the Litigation is Immaterial to the Merits of this Petition..... 6

III. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS FAILED TO ADHERE TO BINDING FEDERAL PRECEDENT..... 7

IV. CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

Avco Corp. v. *Machinists*, 390 U.S. 557, 558 (1968). 3

Caterpillar v. *Williams*, 482 U.S. 386, 398-399 (1987)..... 2, 3, 4

Electrical Workers v. *Hechler*, 481 U.S. 851, 859, n.3 (1987)..... 4

Ferguson v. *WGA*, 226 Cal.App.3d 1382 (1991)..... 8

International Longshoreman's Association v. *Davis*, 476 U.S. 380, 480 (1986)..... 6

Lydon v. *Boston Sand & Gravel*, 175 F.3d 6 (1st Cir. 1999)..... 2

Marino v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480 (1993)..... 4, 8

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 65 n.8 (1987)..... 3

Statutes

29 U.S.C. § 185..... 1

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. PRELIMINARY STATEMENT

Respondent concedes that Section 301 (a) of the Labor Management Relations Act, 29 U.S.C. § 185, does not permit a state court to actively interpret a collective bargaining agreement ("CBA"), which task is within the *exclusive* jurisdiction of the federal courts. Respondent further concedes that the state court, in conducting an evidentiary "mini-trial" for the purpose of interpreting the CBA, ignored binding federal authority construing that very CBA, on the same facts, and between the same parties. Turning a blind eye to controlling federal authority on an issue within the exclusive jurisdiction of the federal courts is both a violation of the principle of *stare decisis* and the Supremacy Clause of the United States Constitution.

II. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS ACTED IN EXCESS OF SUBJECT MATTER JURISDICTION

A. Complete Preemption is an Exception to the Well Pleaded Complaint Rule

Respondent argues that Petitioner "chose" the state forum and should not now be heard to complain. No choice was presented,[1] nor would such choice have

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[1] There was no "choice of forum" as suggested by Respondent Brief in Opposition to Petition for Writ of Certiorari ("Opposition"), at p. 4. Petitioner was compelled to file claims arising from the mishandling by Respondent of his credit

the effect of conferring subject matter jurisdiction where none may be had. The interpretation of a CBA is reserved *exclusively* to the federal courts, Congress having provided for the *complete preemption* of this subject matter. *Lydon* v. *Boston Sand & Gravel*, 175 F.3d 6 (1st Cir. 1999). No concurrent jurisdiction is possible. "Not only have they conferred jurisdiction... on the federal courts, but they have also *prohibited* state courts from hearing them. *Lydon*, at p. 14 (emphasis added).

Respondent mis-cites the "well pleaded complaint rule." Opposition at p. 5. Quoting selectively from *Caterpillar* v. *Williams*, 482 U.S. 386, 398-399 (1987), Respondent argues that a well pleaded complaint which does not reveal a federal cause of action on its face cannot be removed upon the interposition of a federal defense. Opposition at p. 5. However, this Court, in its *Caterpillar* opinion, noted the exception not revealed by Respondent's redacted quote:

> "There does exist, however, an 'independent corollary' to the well-pleaded complaint rule, [] known as the 'complete pre-emption' doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state commonlaw complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'

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determination arbitration under the Writer's Guild of America ("WGA") collective bargaining agreement ("CBA") in state court. No diversity of jurisdiction existed; the claims were common law malpractice claims.

Metropolitan Life Insurance Co. v. *Taylor*, 481 U.S. 58, 65 n.8 (1987). "

Caterpillar v. *Williams*, supra, at p. 327. When "the heart of the complaint [is] a ...clause in the [CBA]" that complaint arises under federal law. *Avco Corp.* v. *Machinists*, 390 U.S. 557, 558 (1968). Were the state court merely to *enforce* the CBA by application of the Ninth Circuit's interpretation of the WGA CBA, a state cause of action would be presented. When the state court determined that Respondent's liability was *contingent upon* and required *active interpretation* of that CBA, it had two permissible options: declining jurisdiction or adhering to the Ninth Circuit opinion.[2] "Section 301 governs claims founded directly on rights created by [CBAs] as well as claims 'substantially dependent on analysis of a-[CBA].'" *Caterpillar*, supra at 394, citing *Electrical Workers* v. *Hechler*, 481 U.S. 851, 859, n.3 (1987).[3]

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[2] Respondent also fails to state that this Court, in *Caterpillar*, expressly did *not* decide whether, *in a case of complete preemption*, removal may be based upon a defense requiring interpretation of a CBA. "We intimate no view on the merits of this or any pre-emption arguments discussed above." *Caterpillar*, supra at p. 398, n. 13.

[3] Respondent also misapprehends the facts of *Caterpillar*, supra, in which defendant argued that a suit for wrongful termination based on implied contracts of employment were subsumed into a CBA when the plaintiffs returned to their collective bargaining unit. This Court observed that the CBA played no part in the implied agreements and the CBA would not need to be examined. The Court also held that the individual contracts were not "subsumed" in the CBA as a matter of law. *Caterpillar*, supra at p. 395, n. 9.

B. The CBA Provisions Control the Credit Arbitration Procedures

Petitioner's instant claims are the product of the Ninth Circuit decision. Petitioner, in prior federal litigation against the WGA for breach of the CBA and the WGA's duty of fair representation, obtained a published opinion articulating the meaning of the credit determination procedures under the CBA. *Marino* v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480 (1993).

That decision makes clear that Petitioner raised serious question as to whether his arbitration -- which included no confrontation of witnesses, cross-examination of witnesses, contemporaneous record, and which was conducted by an anonymous panel of arbitrators acting in secret, represented a breach of the duty of fair representation by WGA to its member[4] and/or a breach of the CBA. The Ninth Circuit concluded that the WGA did provide some procedures guaranteeing a modicum of fairness but that Respondent *failed to request them* on his behalf or *to protest timely* the anonymity of the arbitrators.

Petitioner proceeded to the California court with his malpractice claims, based upon the Ninth Circuit's holding that his attorneys, self-avowed "experts" in this area of entertainment law, had not availed of the procedural safeguards permitted under the CBA. Petitioner could not have anticipated that Respondent

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[4] The duty of fair representation doctrine serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967).

would produce testimony at a mini-trial directly contradicting the findings and conclusions of the Ninth Circuit about the meaning of the CBA procedures. Nor could he anticipate, *ab initio*, that the trial court would ignore the Ninth Circuit decision and undertake a *de novo*, active interpretation of the CBA and rules promulgated thereunder.

Respondent contends in its Opposition -- for the first time -- that the trial court only interpreted the Credits Manual and not the CBA, a claim unsupported by the record. Respondent has previously admitted that the trial court did, in fact, "interpret the CBA"[5] and should be estopped to contend otherwise. Respondent specifically conceded that the Credits Manual is a "part of [the] collective bargaining agreement."[6]

C. Petitioner Preserved His Objections and is Not Estopped to Raise Them

Petitioner consistently objected to the conduct of the mini-trial, particularly emphasizing that the trial court was departing from the Ninth Circuit's opinion in

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[5] See, e.g., Respondent Kenoff & Machtinger's Answer to Petition for Review, at p. 8: "In addition, K & M filed Motion in Limine No. 7 in which it sought to bifurcate the trial so *that the interpretation of the WGA Credits Manual (which is a part of a collective bargaining agreement and a pure matter of contract interpretation controlled by federal law)* would be tried by Judge Hiroshige as a bench trial." See also, id., at p. 9: "Beginning on March 17, 2000, and continuing on March 20, April 12, 13, and 17, 2000, Judge Hiroshige conducted a 5-day bench trial concerning the *interpretation of the collective bargaining agreement* with respect to the Phase I Hearing Issue." (Emphasis added.)

[6] See fn. 1, supra.

Marino as to the meaning of the "Phase I" hearing in the credit arbitration.[7]

D. Estoppel Will Not Defeat the Assertion of a Claim of Complete Preemption

More importantly, a claim that the state court acted in excess of its subject matter jurisdiction may be raised at any time. Equitable estoppel will not lie to defeat a claim that jurisdiction was exceeded. Where preemption is complete, the issue is jurisdictional and may be raised at any time. *International Longshoreman's Association* v. *Davis*, 476 U.S. 380, 480 (1986).

E. The Longevity of the Litigation is Immaterial to the Merits of this Petition

Respondent makes multiple references to the length of this litigation, insinuating that is informative of the merits of this Petition. The fact that state courts acted in excess of jurisdiction for an appreciable time does not create jurisdiction in those courts in violation of federal labor law.[8]

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[7] He objected to the admission of evidence, adduced by Respondent through volunteer "expert" witnesses from the WGA, that the Phase I hearing did not include the full panoply of procedural rights described by the Ninth Circuit. No equitable estoppel will lie on these facts.

[8] Petitioner has vigorously pursued his rights, including appeal rights, for several years, during which time, he *succeeded on his first appeal*, reversing the trial court's improvident grant of summary judgment, only to return to the same trial judge who again granted partial summary adjudication, conducted a mini-trial in excess of his jurisdiction, and deprived Petitioner of a trial on all causes of action against Respondent.

III. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS FAILED TO ADHERE TO BINDING FEDERAL PRECEDENT

Respondent argues that the trial court's interpretation of the CBA was "consistent" with that of the Ninth Circuit. This is simply not true. The Ninth Circuit observed that during Phase I of a credit arbitration, "common factual disputes" would be tried, at an evidentiary hearing, with confrontation and cross-examination of witnesses, the parties to be represented by counsel. Such "common factual disputes" were found to include disputes as to "authenticity, identification, sequence, authorship, or completeness of any literary material to be considered." *Marino*, supra, at p. 1482.[9] Had such procedures been requested by Respondent on his behalf, Petitioner would have, *inter alia*, confronted the purported screenwriters, Francis

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[9] "[A] special committee conducts 'a hearing at which all participating writers may present testimony and documentary evidence.' Manual, Credit Determination Procedure (CDP) § D.4. That committee's factual determination is binding and forms a part of the basis of the material that goes to those who conduct the second phase of the process." *Marino*, supra, at p. 1482. Respondent argued that a Phase 1 hearing is limited to "an inquiry into which participating writer wrote the particular story, treatment or script in question such that the writer's name should appear on the title page for purposes of submitting to the Arbiters in Phase 2." Minute Order, dated January 11, 2000, attaching Tentative Ruling, Motion for Summary Judgment as to the Phase I Issue, Etc.," undated. This conclusion was adopted by the trial court and appeals court and is quite different from the procedure for resolution of "factual disputes" found to exist by the Ninth Circuit upon examination of the same materials: the CBA, WGA Credits Manual, and affidavits of the parties.

Ford Coppola and Mario Puzo, and vigorously cross-examined them as to their "authorship" of the materials -- the heart of any credit dispute. The state court held that no such rights exist in the CBA. Moreover, on the arbiter anonymity issue, not reached by the Ninth Circuit, Respondent contends that the state court was compelled to follow *Ferguson* v. *WGA*, 226 Cal.App.3d 1382 (1991). As explained in the Petition, *Ferguson* suffers from the same infirmity as presented here, a state court acting in excess of jurisdiction on a Section 301(a) claim.

IV. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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